

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 12-920C
)	(Judge Kaplan)
THE UNITED STATES,)	
)	
Defendant.)	

**DEFENDANT’S RESPONSE TO PLAINTIFF’S BRIEF ON THE
ISSUE OF WHETHER PROVIDERS AT THE MONTANA VA
FACILITY SHOULD BE INCLUDED AS MEMBERS OF THE CLASS**

Pursuant to the Court’s October 13, 2020 Order (ECF No. 204), defendant, the United States, respectfully submits this response to Plaintiff’s Brief on the Issue of Whether Providers at the Montana VA Facility Should Be Included as Members of the Class (ECF No. 208).

Recognizing that no opt-in plaintiff (as of November 30, 2017) worked or has worked at the Fort Harrison VA, as required by the Court’s definition of the class, plaintiffs assert that Jennifer Allred, a named plaintiff, is an opt-in plaintiff because she joined the lawsuit on November 16, 2015. ECF No. 208, at 2 n.2. Not being an original named plaintiff, however, is not the same as being an opt-in plaintiff.

In a class action, named plaintiffs sue on behalf of themselves and also on behalf of the putative class members. RCFC 23(a). Ms. Allred is such a named plaintiff suing on behalf of herself and other putative class members. Amended Complaint, ECF No. 56; Plaintiffs’ Motion to Certify Class Action, ECF No. 127, at 2 (“Plaintiffs also move for the appointments . . . of the named plaintiffs Stephanie Mercier, Audricia Brooks, Deborah Plageman, Jennifer Allred, and Michele Gavin as Class Representatives for the Rule 23 Class.”); Opinion and Order, ECF No.

138, at 2 (“The named plaintiffs in this putative class action are four APRNs and one PA” (citing Amended Complaint)).

Under RCFC 23, putative class members must opt-in to the class action brought by the named plaintiffs on their behalf. RCFC 23, Rules Committee Notes, 2002. According to plaintiffs’ Motion to Certify Class Action, there were “374 opt-in plaintiffs” as of November 30, 2017. Plaintiffs’ Mot. to Certify Class Action, ECF No. 127, at 12. When plaintiffs, in their motion, proposed a class definition limited to employees “who work, have worked, or will work at VA facilities where at least one opt-in plaintiff also works, or has worked, as of [November 30, 2017]” (*id.* at 2), they were referring to these 374 opt-in plaintiffs. Not surprisingly, named plaintiff Ms. Allred is not one of the 374 opt-in plaintiffs. Decl. of David M. Cook In Support of Plaintiffs’ Motion for Class Certification (Cook Decl.), ECF No. 127-1, Exh. No. 8, at A222-A229. There is simply no support for Ms. Allred’s assertion that she is an opt-in plaintiff.

Even if Ms. Allred were one of the opt-in plaintiffs in plaintiffs’ Motion for Class Certification, which she was not, her work at Fort Harrison VA Medical Center would not make it a class facility. The Court’s definition of the class effectively limits the class facilities to those that were part of the class as of November 30, 2017. As we pointed out in our opening brief, Ms. Allred worked at the Fort Harrison VA Medical Center prior to the class claim period. As of November 30, 2017, therefore, Fort Harrison VA Medical Center was not a class facility. Allowing plaintiffs to add a new facility to the class based on work outside of the claim period would contradict the limit on class facilities in the Court’s definition of the class.

In short, the Fort Harrison VA is not one of the facilities at which any opt-in plaintiff worked or has worked as of November 30, 2017. The employees at this non-class facility,

identified by plaintiffs as Emily Russ, Paula Durrell, and Tera Gorecki (ECF No. 208, at 1), therefore, do not satisfy the court's definition of the class.

Respectfully Submitted,

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